STATE OF MICHIGAN

COURT OF APPEALS

AIREDALE OF NORTH AMERICA, INC.,

Plaintiff-Appellee,

v

MID AMERICA MECHANICAL, INC., and MARCI ADDINGTON,

Defendants,

and

WHITAKER CONSTRUCTION COMPANY,

Defendant/Third-Party Plaintiff,

and

DOUG ADDINGTON,

Defendant/Third-Party Defendant,

and

TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA,

Defendant/Third-Party Plaintiff-Appellant.

UNPUBLISHED
June 24, 2003

No. 234311
Van Buren Circuit Court
LC No. 99-460298-CK

Before: Schuette, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

In this action on a surety bond, defendant/third-party defendant Travelers Casualty and Surety Company of America ("Travelers") appeals as of right the trial court's grant of summary disposition to plaintiff pursuant to MCR 2.116(I)(2). We reverse.

I. Facts and Proceedings

In October 1998, defendant/third-party plaintiff Whitaker Construction Company ("Whitaker") entered into a contract with Gobles Public Schools to act as the general contractor for a construction project. Pursuant to MCL 129.203, Travelers furnished the payment bond for the project. Whitaker subsequently contracted with defendant Mid America Mechanical, Inc. ("Mid America"), which agreed to supply and install heating and air conditioning equipment at the project site. In November 1998, Mid America contracted with plaintiff, Airedale of North America, Inc., a vendor of ventilation equipment.

The next day, plaintiff sent Mid America its "Submittals for Gobles Schools," a document containing equipment specifications and technical drawings for the project's ventilation units. Mid America then forwarded the document to Whitaker for approval. On April 13, 1999, after corresponding with Whitaker about the delivery date, plaintiff shipped the first ventilation unit. Plaintiff shipped the last ventilation unit for the project on May 11, 1999.

In July 1999, Mid America informed plaintiff that it had closed its business. Although Mid America had been paid by Whitaker, Mid America failed to pay plaintiff in full. On July 23, 1999, plaintiff sent a letter to Whitaker and Travelers that advised them that Mid America still owed plaintiff $77,127.60 and provided notice of its claim against other parties that might be liable for the debt, including Travelers.

Plaintiff filed the instant action in December 1999. The only claim in plaintiff's amended complaint that is relevant on appeal is plaintiff's claim against Travelers on the payment bond. In count IV of its amended complaint, plaintiff alleged that Whitaker had actual notice of plaintiff's involvement in the project during the time prescribed in MCL 129.207 and that Whitaker and Gobles Public Schools had actual notice within ninety days of plaintiff's last product delivery that Mid America failed to pay plaintiff. Accordingly, plaintiff claimed that it had fulfilled the statutory requirements for payment from the Travelers bond.

In October 2000, Travelers moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), claiming that plaintiff had not complied with the thirty-day notice requirement of MCL 129.207.[1] Plaintiff opposed the motion, asserting that the submittal document and subsequent correspondence met the notice requirement. At oral argument, Travelers also argued that plaintiff had not complied with the ninety-day notice requirement of MCL 129.207. The trial court disagreed with Travelers, stating that, because plaintiff complied with the notice requirements of the statute, no genuine issues of material fact existed that precluded awarding plaintiff summary disposition. This appeal ensued.

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[1] Travelers and Whitaker filed a joint motion for summary disposition. Whitaker's argument pertained to plaintiff's claim of unjust enrichment, a claim filed solely against Whitaker. Plaintiff conceded in response to the motion that its unjust enrichment claim should be dismissed. Accordingly, our review is limited to the portion of the motion addressing plaintiff's claim against Travelers.

II. Standard of Review

This Court reviews de novo the trial court's decision concerning a motion for summary disposition. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). Summary disposition pursuant to MCR 2.116(C)(10) is appropriate when genuine issues of material fact do not exist and a party is entitled to judgment as a matter of law. *Id.* at 164. The interpretation and application of a statute also presents a question of law that we review de novo. *Id.* at 159.

III. Analysis

MCL 129.207 provides that a payment bond claimant that does not have "a direct contractual relationship with the principal contractor," such as plaintiff, "shall not have a right of action upon the payment bond unless" it complies with certain notice requirements. First, within thirty days after furnishing the first materials or performing the first labor under the contract, the claimant must serve a written notice on the principal contractor, informing the principal contractor "of the nature of the materials being furnished or to be furnished, or labor being performed or to be performed and identifying the party contracting for such labor or materials and the site for the performance of such labor or the delivery of such materials . . . ." *Id.* Second, within ninety days of furnishing the last materials or performing the last labor under the contract, the claimant must give "written notice to the principal contractor and the governmental unit involved" concerning "the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed." *Id.*

The statute also requires the claimant to serve each notice "by certified mail, postage prepaid, in an envelope addressed to the principal contractor, the governmental unit involved, at any place at which said parties maintain a business or residence." *Id.* But see *Pi-Con, Inc v A J Anderson Constr Co*, 435 Mich 375, 378; 458 NW2d 639 (1990) (stating that failure to serve the first notice by certified mail will not preclude recovery as long as the claimant timely sent the notice, the notice otherwise complies with the statute, and the claimant proves by a preponderance of the evidence that the principal timely received the notice).

Travelers first argues that the trial court erroneously granted plaintiff summary disposition because the document titled "Submittals for Gobles Schools" and the subsequent correspondence between plaintiff and Whitaker do not suffice as the "notice" mandated by the statute's first notice requirement. We do not need to resolve this question, however, because Travelers correctly argues that plaintiff has not complied with the ninety-day notice provision. See *WT Andrew Co, Inc v Mid-State Surety Corp*, 461 Mich 628, 635 n 5; 611 NW2d 305 (2000), citing *Taylor v Auditor General*, 360 Mich 146, 154; 103 NW2d 769 (1960). It is undisputed that plaintiff did not send written notice to the governmental unit involved, Gobles Public Schools, indicating that Mid America failed to pay over $77,000 due on its contract with plaintiff.[2]

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[2] Plaintiff asserts that Travelers failed to preserve this argument for our review. We disagree. Although Travelers did not specifically cite plaintiff's failure to provide a written notice to Gobles Public Schools, Travelers argued at the hearing on its motion for summary disposition (continued…)

Plaintiff asserts that despite its failure to comply with the terms of the statute, it is entitled to recover on the bond. We disagree. When a statute is unambiguous, we must apply the language as written by the Legislature. *Crowe v City of Detroit*, 465 Mich 1, 6; 631 NW2d 293 (2001). Contrary to plaintiff's assertions, a statute's remedial nature does not deprive the statute's plain language of its force. Liberal construction of remedial statutes is permitted only if the statue is ambiguous. *Id.* at 13. Here, the statute unambiguously requires plaintiff to give written notice to the governmental unit involved.

Plaintiff also relies on *People for Use of Chasteen v Michigan Surety Co*, 360 Mich 546; 104 NW2d 213 (1960), in support of its argument that it is able to recover on the bond despite its failure to give written notice as required by statute. *Chasteen*, however, addresses a different statute, MCL 570.102, which, although similar, contains different requirements. MCL 570.102 requires the bond claimant to provide notice to the governmental board involved, which, in turn, must provide notice to the surety. MCL 570.102; *Chasteen*, *supra* at 547. In *Chasteen*, the plaintiff provided notice directly to the surety, rather than the governmental board, and the Court excused the plaintiff's failure to serve the governmental board, noting that the surety received actual notice. *Id.* at 547, 549. In contrast, MCL 129.207 requires the claimant to provide written notice to the governmental unit involved, without reference to providing notice to the surety. Additionally, unlike MCL 570.102, MCL 129.207 states that a bond claimant "shall not have a right of action" unless the claimant meets the requirements of the statute.[3] *Chasteen*, therefore, is distinguishable and does not prevent us from applying the language of MCL 129.207 to this case.

Plaintiff also briefly argues that Travelers should be estopped from arguing that Whitaker did not receive proper notice under MCL 129.207 because Whitaker instructed Mid America to temporarily withhold payment from plaintiff while Whitaker resolved a dispute with plaintiff concerning the ventilation units. However, because our decision is based on plaintiff's failure to comply with the statute's requirement that plaintiff provide written notice to Gobles Public Schools, plaintiff's equitable estoppel argument is inapplicable.

Reversed and remanded for entry of judgment in favor of Travelers. We do not retain jurisdiction.

/s/ Bill Schuette
/s/ David H. Sawyer
/s/ Kurtis T. Wilder

(…continued)

that plaintiff failed to fulfill the statute's ninety-day notice requirement, which includes serving written notice on the governmental unit involved. Moreover, the trial court ruled that plaintiff fully complied with both notice requirements. Accordingly, the issue is adequately preserved for our review. See *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002).

[3] Plaintiff cites *Charles W Anderson Co v Argonaut Ins Co*, 62 Mich App 650, 654; 233 NW2d 691 (1975), for the proposition that "the legislative purpose behind [the] notice requirements [of MCL 129.207 and MCL 570.102] is indistinguishably similar." However, we are not bound by that case. MCR 7.215(I)(1). Moreover, although the purpose of the statutes may or may not be similar, the language of the statutes is not identical.